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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-246

UNITED STATES OF AMERICA, *Petitioner*

v.

ALICE R. HOPKINS, Special Administrator, *Respondent*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Claims dated March 19, 1975 is reported at 206 Ct. Cl. 303, 513 F.2d 1360, and appears as the Appendix to the Government's Petition herein.

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction under the Tucker Act to entertain a suit against the United States for money damages for the improper discharge of an employee of a military exchange.

STATUTE INVOLVED

The Tucker Act, 28 U.S.C. § 1491, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.*

The italicized language was added in 1970 by Pub. L. 91-350, 84 Stat. 449, and is frequently referred to herein as the 1970 amendment.[1]

Portions of other referenced statutes and regulations are set forth in Appendices A and B to Brief of the United States, ¶ 1A-32A.

[1] Pub. L. 91-350 also added the identical language to 28 U.S.C. § 1346(a)(2), which grants the District Courts concurrent jurisdiction with the Court of Claims for claims not in excess of $10,000. And it added a proviso to § 1302 of the Supplemental Appropriation Act of 1957 (70 Stat. 694; 31 U.S.C. § 724(a)), that the Exchange Services "shall reimburse the United States for a judgment or compromise settlement paid by the United States."

STATEMENT

A. Background of Case and Facts

On August 6, 1968, respondent-plaintiff,[2] a retired Air Force enlisted man, was discharged involuntarily from civilian employment with the European branch of the Army and Air Force Exchange Service, a "nonappropriated fund" instrumentality of the United States. Respondent filed a complaint in the United States Court of Claims to recover back pay and other benefits lost by reason of the discharge, alleging therein that his employment

(i) "arose by virtue of a contract of employment between defendant's Exchange Service and plaintiff" (para. 4)

(ii) "and/or by virtue of appointment pursuant to regulations. . ." (para. 4),

and alleging further that his discharge

(i) "was a breach of plaintiff's contract of employment," (para. 15)

(ii) "was in violation of defendant's regulations and procedures," (paras. 12-13)

(iii) "was in violation of plaintiff's rights of due process," (para. 15)

(iv) "and was arbitrary and capricious." (para. 14).

[2] Roy C. Hopkins, plaintiff below, died on June 7, 1974, and by order of this Court dated December 8, 1975, his widow, Alice R. Hopkins, Special Administrator of his Estate by appointment in the Superior Court of California, County of San Diego, was substituted as party respondent. The decedent will be referred to as respondent.

Jurisdiction below was premised on the jurisdictional statute known as the Tucker Act, 28 U.S.C. § 1491, and the 1970 amendment thereto, namely, Pub. L. 91-350, § 1(b), 84 Stat. 449, quoted above.

Petitioner-defendant moved to dismiss on the procedural ground that no claim was stated within the jurisdiction of the court because respondent was neither a contract employee nor a federal employee entitled to judicial review of his discharge. The Court of Claims denied the government's motion and held that respondent's employment relationship with the Exchange Service was contractual and the 1970 amendment conferred jurisdiction for such a contract claim.

It has been and remains respondent's position that he is entitled to claim against the United States for his improper discharge either as a contract employee on the basis of the 1970 amendment, or, if not a contract employee, on the basis of the other Tucker Act provisions because the claim is one arising from the Constitution, statutes, executive regulations and/or for non-tort liquidated damages.

B. Evolution and Present Composition of Exchange Services

The Exchange Services are the ultimate successors to the itinerant merchants known as sutlers who, over the centuries, have followed armies selling items not furnished by quartermasters.[3] Congressional action

[3] Sutlers followed Caesar. (Caesar, Alexandrian, African and Spanish Wars, Wm. Heineman Ltd., London, MCMLV, Libr. Cong. Ref. PA 6156.A1—Lebienus harassed Caesar's rear guard and "by this means cut off the baggage trains of the sutlers and merchants who were carrying their wares in carts. . ."—at passage 75). The Articles of War of 1775 of the American Revolutionary Army specified the duties of sutlers. (Articles XXXII, LXIV, LXV and LXVI, Rules and Articles of War 1775, Appendix IX, Winthrop,

eliminated sutlers for the American military after, and apparently as a result of unsatisfactory conduct during, the Civil War and authorized establishment of "post traders" who were given exclusive trading licenses at various posts.[4]

Late in the same century, establishment of "canteens" by military units for supply and recreation purposes at locations having no post trader was authorized by Army regulation and these eventually proliferated.[5] In 1892, post canteens were redesignated post exchanges and the following year assumed functions of the post traders when Congress prohibited further appointment of the latter.[6]

In 1895, post exchanges were authorized by "Post Exchange Regulations" at all military installations "to supply the troops at reasonable prices with the articles of ordinary use, wear, and consumption not

Military Law and Precedents, 953 (2d ed., 1920, G.P.O.)) (E.g., Article LXIV at 958: "No suttler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open, for the entertainment of soldiers, after nine at night, or before the beating of the reveilles, or upon Sundays during divine service or sermon on penalty of being dismissed from all future suttling.") Congress approved the authorization of one sutler for each post or regiment as prescribed in Article 41 of General Regulations of the Army for 1821. (Act of March 2, 1821, 3 Stat. 615)

[4] Sutlers were eliminated by Congress in 1866. (Act of July 28, 1866, ch. 299, § 25, 14 Stat. 336) Post traders were authorized in 1867. (Joint Resolution of March 30, 1867, 15 Stat. 29)

[5] Canteens were established officially in 1889. (General Order No. 10, Feb. 1, 1889; Army Regs., Art. XXXIX) Restriction of canteens to locations lacking post traders was eliminated in 1890. (General Order No. 51, May 13, 1890)

[6] General Order No. 11, Feb. 8, 1892; Act of Jan. 28, 1893, c.51, 27 Stat. 426.

supplied by the government, and to afford the means of rational recreation and amusement."[7] This was done by the Secretary of War "under authority of Congressional enactments." *Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481, 483, 86 L.Ed. 1611, 1615 (1942).

The post exchanges and the Navy's ship's stores (known collectively as Exchange Services) were integrated on a worldwide basis by the Secretaries of the military departments in 1956.[8] There are now five components of the system and these are named in Public Law 91-350 (the 1970 Tucker Act amendment): Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, and Exchange Councils of the National Aeronautics and Space Administration. (84 Stat. 449)

The Exchange Services have been continuously subsidized by appropriated funds since the authorization in 1895.[9] "Congress has repeatedly made substantial

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[7] General Order No. 46, Headquarters of the Army, July 25, 1895, quoted in *Dugan* v. *United States*, 34 Ct. Cl. 458, 462 (1899).

[8] H.A.S.C. No. 91-77, Report by the House Special Subcommittee on Exchanges and Commissaries of the Committee on Armed Services, 91st Cong., 2d Sess. (1970) (Libr. Cong. ref. KF32.A746), at 12350, 12383-84. (Report hereafter sometimes referred to as H.A.S.C. Rep. No. 91-77.)

[9] E.g., the fiscal 1904 Army Appropriations Act provided $500,000 for "continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school building, reading, lunch, amusement rooms and gymnasium. . ." Act of March 2, 1903, ch. 975, 32 Stat. 927 at 938. The fiscal 1919 Army Appropriations Act allotted $2,994,950 under Military Post Exchanges and provided that "not more than $629,000 of this appropriation may be expended for personal services and no person shall be employed

appropriations to be expended under the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges." *Standard Oil Co. of California* v. *Johnson, supra,* at 484.

The Army and Air Force Exchange Service is headed by a General Officer and overseen by a Board of Directors which reports directly to the Secretaries of the two services.[10] Government of the Exchanges is effected through regulations and circulars issued by the departmental Secretaries. (32 C.F.R. § 554.1 (1972)) These are promulgated pursuant to 10 U.S.C. §§ 3012 and 8012 which authorize the Secretaries of the Army and Air Force to conduct all affairs of the two departments. Each individual exchange unit is commanded by military officers while operational management is performed by employed civilians. (32 C.F.R. § 554.11 (1972)) (Brief of United States, at 3A)

The Exchange services are a major aspect of the Department of Defense operations. For the fiscal year 1971, the four military Exchange Services constituted the nation's second or third largest department store chain with annual sales of over $3,546,000,000.[11] As of

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hereunder at a rate of compensation exceeding $1,800 per annum." Act of July 9, 1918, ch. 143, 40 Stat. 845, 862.

However, in 1956, Congress enacted legislation prohibiting money appropriated for support of the Army and Air Force to be spent for Post Exchanges, although use of public buildings and public transportation was not prohibited. Act of Aug. 10, 1956, c.1041, 70A Stat. 270, 591, 10 U.S.C. §§ 4779(c), 9779(c).

[10] H.A.S.C. Rep. No. 91-77, at 12351.

[11] H.A.S.C. No. 92-75, Report by House Special Subcommittee on Nonappropriated Fund Activities Within the Department of Defense, of the Committee on Armed Services, 92d Cong., 2d Sess.

the present, they employ in excess of 100,000 civilian employees.[12] (Brief of the United States, footnote 2 at 3)

Congress exercises monitoring control over the Exchange operations. Thus, in 1949, 1953, 1957, 1970, 1972, the House Armed Services Committee reviewed operations and submitted to Congress findings and recommendations which were heeded by the military.[13]

C. Précis of Judicial Decisions Involving Nonappropriated Fund Activities

Judicial decisions touching on Exchange Services and other nonappropriated fund activities can be

(1972), at 16619. (Report hereafter sometimes referred to as H.A.S.C. Rep. No. 92-75.)

[12] The gross for the four military exchange services of $3,546,000,000 and employment of over 100,000 makes interesting contrast with executive departments of the government. For example, the non-military or civil budget of the Department of Defense for fiscal 1974 was $1,779,195,000, just one-half of that gross. The 1974 budget (actual) for State ($813,504,000), Justice ($1,920,804,000), Interior ($1,960,691,000) and Commerce ($1,501,432,000) were all far less.

And the totals of employees for fiscal 1974 for most executive departments were far less: State (22,644), Justice (48,188), Agriculture (79,621), Labor (12,788), Commerce (28,549), H.U.D. (15,021). The Treasury was about the same (104,391). Only Departments of Defense and Health, Education and Welfare (126,692) had more employees.

Statistics from United States Budget for fiscal 1975.

[13] H.A.S.C. Rep. No. 91-77, at 12349-50. The 1972 report reiterated this oversight function:

> As evidenced by the magnitude of this awesome entity within the Department of Defense, affecting military personnel and civilians at all levels, it is absolutely essential that the Congress of the United States maintain a continued monitoring of these vital and necessary activities. [H.A.S.C. Rep. No. 92-75, at 16616.]

grouped into four categories: (i) the leading decision by this Court, which held Exchange Services are instrumentalities of the United States: (ii) the Court of Claims decisions relating to contract claims and status of nonappropriated fund activities; (iii) the United States Circuit Court decisions mainly interpreting the Federal Tort Claims Act; and (iv) some miscellaneous other cases. There are apparently few if any state cases because a suit against a nonappropriated fund activity would involve an instrumentality and officers of the United States and be subject to removal to a federal court under 28 U.S.C. §§ 1442, 1442a.

(i) The governing case and the only one by this court directed to the status of Exchange Services is *Standard Oil Co. of California* v. *Johnson,* 316 U.S. 481, 86 L.Ed. 1611 (1942).[14] At issue was the applicability of a state gasoline tax to sales made to an Army post exchange. The Court noted that post exchanges operate under executive regulations which have the effect of law, that Congress has repeatedly recognized the activities of post exchanges are governmental and has made substantial appropriations for them, and that management and control is by government officials.

[14] *Paul* v. *United States,* 371 U.S. 245, 9 L.Ed. 2d 292 (1963), in part involved nonappropriated fund activities but the issues are not pertinent here. It was held that minimum wholesale price regulations for milk issued by State of California were in conflict with federal procurement policies and, therefore, not applicable to military purchases paid for out of appropriated funds. However, in respect to milk purchases for use in military clubs and post exchanges, which were paid for out of nonappropriated funds, it appeared to the court there was no conflicting federal procurement policy and, therefore, the case was remanded to ascertain whether the nonappropriated fund purchases were made within a federal enclave over which the United States had exclusive legislative control, in which event the state regulation could not prevail.

The Court also noted that the "government assumes none of the financial obligations of the exchange," a passing comment that influenced subsequent Court of Claims cases.

The Court held that the post exchanges are arms of the government deemed by it essential for performance of governmental functions, are integral parts of the War Department, and partake of whatever immunities that department may have under the Constitution and federal statutes, and are not subject to state taxation.

(ii) The Court of Claims has issued some fourteen decisions which in varying degrees relate to nonappropriated fund activities. The essence of these cases is stated, in chronological order, in the footnote below.[15]

[15] In *Dugan* v. *United States*, 34 Ct. Cl. 458 (1899), the first Court of Claims case on non-appropriated funds, it was held that the funds were established by regulation for governmental purposes, were, therefore, governmental enterprises, and as such were immune from Federal taxation. The next was *Williams* v. *United States*, 44 Ct. Cl. 175 (1909), which held that a Navy officers' mess on shore, not a Post Exchange, was only a private association rather than an instrumentality of the United States. In *Kyle* v. *United States*, 46 Ct. Cl. 197 (1911), not involving a Post Exchange, an enlisted man sought to recover the $10 per month he paid into the "post or company fund" for the privilege of serving as post barber, but it was held the United States was neither party to nor privy with the transaction and was, therefore, not liable. In *Woog* v. *United States*, 48 Ct. Cl. 80 (1913), it was held the paymaster could withhold from pay the amount of the funds an officer embezzled from the Post Exchange on Guam because the Post Exchange was a government institution, under control and regulations of the military, and the embezzled funds had been held in trust by the defalcating officer. In *Kenny* v. *United States*, 62 Ct. Cl. 328 (1926), the Court reached a contrary holding, namely that Post Exchange obligations were not obligations of the United States and, therefore, the United States could not withhold an officer's pay to meet his obligations to the Exchange, there being no debt due the United States. In *Sullivan* v. *United States*, 92 Ct. Cl. 154 (1940), interpreting the dual compensation act, it was held a retired officer was receiving dual compensation from the United States while serving as laundry manager at the Naval Academy because the laundry was built and equipped by the United States and supported in part by appropriated funds, and this was so even though he was paid from nonappropriated funds.

Borden v. *United States*, 126 Ct. Cl. 902 (1953), and *Pulaski Cab Co.* v. *United States*, 141 Ct. Cl. 160 (1958), employment and contract cases, are major decisions and are discussed in the text. *Cockrill* v. *United States*, 155 Ct. Cl. 181 (1961), involved the Dual Compensation Act and the employee of a golf club; the court was unable to ascertain whether plaintiff's employment was "under the United States Government" as no information was submitted by either party as to the nature of the club. In *Gradall* v. *United States*, 161 Ct. Cl. 714 (1963), it was held that an Exchange employee was not a Federal civilian employee for the purposes of salary limitations of the Dual Compensation Act. In *Brummitt* v. *United States*, 165 Ct. Cl. 78 (1964), the Court did not reach the issue whether a nonappropriated fund activity was within the meaning of "agency" for purposes of an I.R.S. code provision because the plaintiff's employer was merely a club and not such an activity.

In *G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1 (1963), not a nonappropriated fund case, the court held the Capehart Housing Act involved the use of appropriated funds and, therefore, was within jurisdiction. In so holding the Court referred to the situation of nonappropriated fund contracts and stated that such contracts, "although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court." The Court cited *Borden* and *Pulaski*. This was dictum, only epitomizing prior holdings.

Keetz v. *United States*, 168 Ct. Cl. 205 (1964), and *Kyer* v. *United States*, 177 Ct. Cl. 747 (1966), employment and contract cases, are major cases and are discussed in the text.

Four of them are most pertinent because they involved employment and/or other contracts with post exchanges, were decided after, and under guidance of, this court's decision in the *Standard Oil Company* case, *supra,* and were the four examples stated by Congress as its reasons for enacting Public Law 91-350:

Borden v. *United States,* 126 Ct. Cl. 902 (1953)

Pulaski Cab Co. v. *United States,* 141 Ct. Cl. 160 (1958)

Keetz v. *United States,* 168 Ct. Cl. 205 (1964)

Kyer v. *United States,* 177 Ct. Cl. 747 (1966)

In *Borden* v. *United States,* 126 Ct. Cl. 902 (1953), the court's primary case on the issue, claimant was, as respondent here, an European Exchange Service employee. He had a contract of employment and sued to recover the salary withheld to set-off payroll funds lost allegedly through his negligence. The Court held that although plaintiff was entitled to recover, it lacked jurisdiction in view of the Supreme Court's "decision" that the Government assumes none of the financial obligations of the exchange.[16] Judge Whitaker, in his dissent, noted that the Supreme Court "decision" was actually an observation made "only incidentally, in the course of describing the operations of the exchange," and was not intended as a holding that the government was not liable on the obligations of the exchange. *Id* at 913. He concluded:

> Congress did not mean for this [result] to happen. It said so when it gave its consent to be sued on its contracts. [*Id.* at 914.]

The Court's next case involved a contract with a Post Exchange to provide taxi service at Fort Leonard Wood in return for ten percent of the gross receipts.

[16] The Court also based its decision on Army regulations providing that Exchange contracts are solely the obligations of the Exchange and not contracts of the United States. As pointed out in the dissent, the Army is not authorized to "say that their contracts are not government contracts," if such is not so. 126 Ct. Cl. 912.

Pulaski Cab Co. v. *United States,* 141 Ct. Cl. 160 (1958). The Court, following *Borden,* held that obligations of the Post Exchange were not obligations of the United States, and, therefore, the United States had not consented to be sued in respect to them. The Court noted that the contract provided it was "not a United States Government contract but is solely the obligation of the [Exchange]." *Id.* at 161.

The next of the four cases was *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964). There plaintiff, as here, was an employee of the Army and Air Force Exchange Service in Europe. He sued to recover back pay for an alleged improper discharge contending, in view of *Borden,* that he was not basing his claim on a contract of employment but upon violation of Air Force regulations. *Id.* at 207. The Court made short shrift of this different approach holding that for an employee to recover for discharge in violation of Air Force regulations, he must be an employee of the United States. It then held, on the basis of two prior decisions,[17] that "an employee of the Exchange Service is not an employee of the United States." *Id.* at 207.

The last case was *Kyer* v. *United States,* 177 Ct. Cl. 747 (1966). There the plaintiff sued to recover brokerage commissions for service he rendered under a contract with the Grape Crush Administrative Committee, a group established pursuant to statutory authority given to the Secretary of Agriculture. The Court held it lacked jurisdiction because the Committee, although an instrumentality of the United States, was not supported by appropriations and did not have authority

[17] *Grodall* v. *United States, supra,* and *Brummitt* v. *United States, supra,* footnote 15.

to obligate appropriated funds for the purpose of the contract.

In *Kyer,* the Court buttressed its *Borden* reasoning by relying for the first time on a statute:

> While the terms of the [Tucker Act] are broad, its words must be read in conjunction with and must be regarded as limited by another statute which provides that our judgments are paid only from appropriated funds. [177 Ct. Cl. at 751]

The statute cited by the Court, 28 U.S.C. § 2517, states:

> (a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

A review of the history of 28 U.S.C. §2517 suggest its purpose was not substantive but bookkeeping and the court's statutory reliance questionable.[18]

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[18] The Act of February 18, 1904, c. 160, 33 Stat. 15, provided in respect to final judgments of all Federal courts that "payment thereof under appropriations made by Congress shall be made on settlements by the auditor for the department or branch of the public service having jurisdiction over the subject matter out of which the claim arose." Then the Act of March 3, 1911, c. 231, 33 Stat. 1087, at § 178, provided that the payment of a Court of Claims judgment shall be full discharge of all claims involved in the controversy.

The final predecessor act was the Act of June 10, 1921, c. 18, 42 Stat. 20. Its stated purpose was to provide a budget system and an independent audit of Government accounts, and for other purposes. Section 236 provided that all claims and demands by or against the Government "shall be settled and adjusted in the General Accounting Office."

The purpose of 28 U.S.C. § 2517 was, as set forth in its preamble, to codify existing law. 62 Stat. 979. It appears, therefore, from the language of the statute and its history that Congress did not intend to restrict or modify the jurisdictional statute but simply prescribed the accounting procedure for the satisfaction of judgments against the United States, whatever their origin.

The court has subsequently withdrawn from the cited statutory reliance, it appears, in view of its major decision in *Eastport Corp.* v. *United States,* 178 Ct. Cl. 599 (1967). That case did not involve nonappropriated fund activities but was an analysis of the ambit of the court's jurisdictional statute.[19] The statute authorizes suits against the United States on claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491, *supra.* It is literally broad enough to be interpreted as a complete Congressional waiver of all non-tort money claims. But the Court of Claims has not so interpreted it and explains in *Eastport* that it has circumscribed its jurisdiction to claims where there exists constitutional or statutory authority mandating Federal compensation expressly or by implication. Although there has been no need for the Court to do so since *Eastport,* the prior holdings in *Borden, Pulaski, Keetz,* and *Kyer,* could be rationalized by *Eastport* on the theory the nature of nonappropriated funds activities establishes absence

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[19] In *Eastport,* a statute authorized the Maritime Commission to regulate sale of American-acquired (as reparations), former German vessels to a foreign purchaser but did not suggest the United States would compensate a party suffering loss as a result of improper execution of such statute. The Court held that it lacked jurisdiction over plaintiff's claim for damage by the Maritime Commission's wrongful non-approval of plaintiff's contract to sell one such vessel to a Danish buyer in view of the lack of express or implied compensation authority.

of mandate to satisfy claims arising therefrom out of appropriated funds.[20]

(iii) In respect to the Federal Tort Claims Act, it is now fully established that the waiver of tort immunity extends to Exchange Services, and their employees are within the Act's reference to negligent conduct "of any employee of the Government." [21] 28 U.S.C. § 1346(b). An employee is defined, in part, as the employee of "any federal agency." 28 U.S.C. § 2671. It is noteworthy that the Government resisted these developments and contended that an Exchange Service was not a "federal agency" and an employee thereof was not an "employee of the Government." *E.g., Daniels* v. *Chanute Air Force Base Exchange,* 127 F.Supp. 920 (E.D. Ill. 1955). Indeed, it stipulated in a later case, despite losing in *Daniels,* that the plaintiff-employee "was not a Government employee. . ." *Aubrey* v. *United States,* 254 F.2d 768, 770 (D.C. Cir. 1958).

(iv) There are various other reported decisions involving in some degree nonappropriated fund activities but most add nothing to the cases already referenced.[22]

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[20] Respondent does not agree with this theory. The theory appears a rather makeshift one to codify various troublesome decisions. The Tucker Act is clear-cut and all-encompassing and should be taken literally for what was intended, a waiver of the anachronistic sovereign immunity concept, except where Congress has explicitly in separate legislation delimited the waiver in specific instances, as pointed out hereafter.

[21] *United States* v. *Holcombe,* 227 F.2d 143 (4th Cir. 1960); Letter dated July 13, 1960, from George C. Doub, Assistant Attorney General, 243 AF JAG Reporter 15 (August 1, 1960).

[22] Many do not involve the Exchange Service. In *Bluer* v. *United States,* 117 F.Supp. 509 (E.D. So.C. 1950), a suit on a contract of employment, jurisdiction was rejected because Congress expressly prohibited officers' messes from paying civilian employees out of

There are some exceptions. In *United States* v. *Howell,* 318 F.2d 162 (9th Cir. 1963), the United States was held to be the proper party to bring an action on behalf of the Exchange Services in a suit brought by the United States to recover from the Exchange's concessionaires sums obtained by fraud. The United States has successfully prosecuted under criminal statutes for the filing of false statements with the Exchange Service. *Brethauer* v. *United States,* 333 F. 2d 302 (8th Cir. 1964). The felony charged was the uttering of a false statement, under 18 U.S.C. § 1001, "in any manner within the jurisdiction of any department or agency of the United States." The Court held that "it is compellingly clear that a Post Exchange, although created by regulations, is an arm of the Government

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appropriated funds. In *Edelstein* v. *So. Post Officers Club,* 118 F.Supp. 40 (E.D. Va. 1951), the district judge, in a one-page memorandum decision, and relying on Army regulations, held the United States was immune from suit for obligations of an officers' club. In *Bailey* v. *United States,* 201 F.Supp. 604 (D. Alaska 1962), the district court dismissed a nonappropriated fund contract case on the authority of *Borden, supra.*

In *American Commercial Co.* v. *U.S. Officers, et al.,* 187 F.2d 91 (D.C. Cir. 1951), in which the United States was not a party, it was held the defendant European officers' club did not operate in the District of Columbia and, therefore, there was no jurisdiction over it in respect to plaintiff's contract claim. In *Nimro* v. *Davis,* 204 F.2d 734 (D.C. Cir. 1953), plaintiff's contract suit against the Naval Gun Factory Lunch Room was held to be, in effect, a suit against the United States and, therefore, under the Tucker Act, the district court did not have jurisdiction.

One recent decision applies the 1970 Tucker Act amendment but is inapposite here. *Swift-Train Co.* v. *United States,* 443 F.2d 1140 (5th Cir. 1971). There plaintiff-supplier claimed as third party beneficiary on a contract between a contractor and The Guest House Fund at Fort Sam Houston, Texas. The Court held Congress deliberately excluded from the amendment's right to sue those nonappropriated fund activities, such as the Guest House, which were not among the Exchange Services listed in the amendment.

and an agency of the United States within the meaning of 18 U.S.C. §1001." *Id.* at 305.[23]

It is noteworthy also that whenever the Exchange Services have been sued in foreign courts, the United States has prevailed in its contention that the Exchange Services are arms of the government and are, therefore, subject to suit only in courts of the United States. *See, e.g., Wuliger* v. *Headquarters, 7408th Supply Group (Special Activities),* Labor Court, Weisbaden, October 8, 1958, unreported, as cited in Senate Report No. 268, 91st Cong., 1st Sess. (1969), at page 2.

D. Legislative History

Public Law 91-350, the 1970 amendment to the Tucker Act, refers only to "express or implied contract":

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, . . . shall be considered an express or implied contract with the United States. [July 23, 1970, Pub. L. 91-350, § 1(b), 84 Stat. 449.]

A review of the legislative history discloses no explicit reference to employees of the Exchange Services. The proposed beneficiaries of the legislation are referred to

[23] Previously, in *Keane* v. *United States,* 272 F. 577 (4th Cir. 1921), it had been held that conspiracy to defraud a post exchange was not a conspiracy to defraud the United States. That decision was before the development of Post Exchanges to their present stature and, especially, before the Supreme Court's *Standard Oil* decision holding the Exchange Services to be instrumentalities of the United States. So it is doubtful that *Keane* has any present significance.

as contractors. But the history shows employee suits were the vertex of Congressional purpose. Hearings on S.3163 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong. 2d Sess. (1968); Hearings on S.980 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969); Hearings on S.980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969); Senate Report No. 268, 91st Cong., 1st Sess. (1969) (Libr. Cong. 1-2:12834-2); House Report No. 91-933, 91st Cong., 2d Sess. (1970); 2 U.S. Code Cong. & Admin. News 1970.

The source of the 1970 amendment was S.980, which was introduced by Senator Tydings on February 7, 1969, with the following remarks, epitomizing what was to be the subsequent legislative history:

> Mr. President, nonappropriated fund activities are at present an anomaly of the law. When states have attempted to tax or regulate nonappropriated fund activities, these organizations have successfully argued that they are immune from taxation and regulation as instrumentalities of the United States. When sued in foreign courts, nonappropriated fund activities have successfully argued that as instrumentalities of the United States they are not liable to contract suit, except in the courts of the United States. Our own courts have held, and the Justice Department has concurred in such holdings, that employees of nonappropriated fund activities, engaged in the performance of their duties, are employees of the United States, so that the United States is liable, under the Federal Tort Claims Act, for their negligence within the scope of their employment. The

United States has, in fact, sued in its own name to enforce contracts entered into by nonappropriated fund activities.

Yet, today, although nonappropriated fund activities are continually identified with their parent department or agency of the United States, contractors with such activities have found the courtroom door barred when they allege a breach of a contract by such an activity. State courts have disclaimed jurisdiction to entertain the claims, holding that the federal courts are the appropriate forum. Both the federal district courts and the U.S. Court of Claims afford no relief because of the alleged loophole in the Tucker Act. Repeatedly, these courts have held that the Tucker Act's waiver of the sovereign immunity of the United States to contract suits is not broad enough to permit the Court of Claims or the U.S. District Court to entertain suits against nonappropriated fund activities.

I fully agree with a judge of the Court of Claims, who, in reluctantly dismissing a suit by a contractor against a nonappropriated fund activity because of the lack of appropriate jurisdiction, stated, "this is a matter which sorely needs congressional correction."

I introduced a similar measure in the 90th Congress, Mr. President, and the Subcommittee on Improvements in Judicial Machinery took 2 days of testimony on the bill . . .

All of the witnesses agreed that there was no rational policy grounds that would justify the continuation of the anachronistic immunity from suits of nonappropriated fund activities, when Congress has already waived such protection from suits on contracts of the U.S. Government itself, and the courts have held the nonappropriated fund activities to be instrumentalities of the United States

for purposes other than suit. This legislation was endorsed in principle by the House of Delegates of the American Bar Association's annual meeting in Philadelphia last August. [115 Cong. Rec., Part 3, p. 3162 (1969), 91st Cong., 1st Sess.]

Hearings on S.980 were held on March 4, 1969. *Hearings on S.980 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. (1969). Senator Tydings opened the hearings with the comment that there was information before the Subcommittee that "the present immunity from contract suit afforded nonappropriated fund activities was an anomaly of the law which needed to be changed." *Id.* at 1. Senator Hruska's statement was, in part, as follows:

> The purpose of this bill is to fill this loophole. It provides the damaged party a forum for suit.
>
> Seldom do we find a bill whose purpose receives such unanimity of support. No rational reason now exists why a person should not be provided a judicial forum to present his claim against a nonappropriated fund activity. [*Id.* at 6.]

The predecessor bill referred to by Senator Tydings as quoted above, was S. 3163, for which there were held two days of hearings on May 8 and 21, 1968. *Hearings on S. 3163 Before The Subcommittee On Improvements In Judicial Machinery of the Senate Committee on the Judiciary,* 90th Cong., 2d Sess. (1968) Congressman Machen, a member of the House Committee on the Armed Services, testified in support of the bill because, he stated, it is

> . . . a necessary measure to correct a jurisdictional gap in the Tucker Act. . . . This gap has de-

veloped because the Court of Claims has held that it does not have jurisdiction over suits against a nonappropriated fund, and this lack of jurisdiction has resulted in an inequity which denies to an individual his day in court. [*Id.* at 84.]

Chief Judge Cowen of the Court of Claims supported S. 3163 as follows:

> . . . I believe not a single witness . . . will take the position that there is any just or logical reason for the immunity of these instrumentalities of the government, when the government itself has been suable on the same grounds for about 100 years.
>
> As you know, in the several cases involving nonappropriated fund activities which the Court of Claims has been compelled to dismiss because of lack of jurisdiction the Court in each case pointed out the need for legislation to bridge this curious, this anomalous, this unwarranted gap in the law.[24]
>
> So, I can sum up very quickly, Mr. Chairman, by saying that the judges of the Court of Claims are unanimously in favor of this legislation, and

[24] In *Borden, supra*, a 1953 pay case, the Court stated:

> We think it is proper that this situation should be called to the attention of Congress. [126 Ct. Cl. 909]

In *Keetz, supra*, a 1964 pay case, the Court stated:

> . . ., we believe that in these situations (especially where the waiver of sovereign immunity is involved) it is up to Congress to remedy this apparent harsh result, and the courts should refrain from legislating by judicial fiat. [168 Ct. Cl. 207]

In *Kyer, supra*, a 1966 brokerage commission case, the Court stated:

> We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs Congressional correction. [177 Ct. Cl. 754]

> that we have no suggestions for any changes or amendments. [*Id.* at 193-194]

The Senate Judiciary Committee reported favorably on S.980. S. Rep. No. 268, 91st Cong., 1st Sess. (1969) (Libr. Cong. 1-2: 12834-2) The report at page 2 explained the need and purpose for the legislation as follows:

> S. 980 will fill a gap in the Tucker Act's waiver of immunity of the United States to claims based upon contracts with departments or agencies of the Government. The United States is liable in the Court of Claims of the United States and, in appropriate cases, in the district courts of the United States, to suits "upon any express or implied contract with the United States***." 28 U.S.C. 1491; 28 U.S.C. 1346(a)(2). The courts have repeatedly held, however, that the Federal Government's liability to suit under these sections only exists with respect to contract obligations to be paid out of appropriated funds. See, e.g., *Kyer* v. *United States*, 369 F.2d 714 (Ct. Claims 1966); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States*, 168 Ct. Claims 205 (1964); *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Claims 1963).
>
> The injustice and inequity worked by this Tucker Act "loophole" have been recognized often. See, *e.g.*, *Borden* v. *United States*, 116 F. Supp. 873, 878-880 (Ct. Claims 1953). Indeed, a judge of the Court of Claims has declared "this is a matter which sorely needs congressional correction." See *Kyer* v. *United States*, 369 F.2d 714, 719 (Ct. Claims 1966).
>
> Nonappropriated fund activities are at present an anomaly of the law. When States have attempted to tax or regulate their activities these activities have successfully argued that they are

immune from taxation and regulation as instrumentalities of the United States. See e.g., *Park Davis* v. *G.E.M., Inc.*, 201 F. Supp. 207 (D. Md. 1962); *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35 (W.D.Ky. 1941). When nonappropriated fund activities have been sued outside the United States they have successfully argued that, as instrumentalities of the U.S. Government, they are not liable to suit on contract in foreign courts. See, e.g., *Wuliger* v. *Headquarters, 7480th Supply Group (Special Activities) Labor Court*, Weisbaden, October 8, 1958, unreported. Courts have held, see, e.g., *United States* v. *Holcombe*, 277 F.2d 143 (4th Cir. 1960); *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill. 1955), and the Justice Department has supported the ruling (letter dated July 13, 1960 from George Cochran Doub, Assistant Attorney General, 243 AF JAG Reporter, 15 (Aug. 1, 1960)), that employees of nonappropriated fund activities when performing their official duties, are employees of the United States and that the United States is liable under the Federal Tort Claims Act for injuries caused by their negligence. The United States has even sued in its own name to enforce contracts entered into by nonappropriated fund activities. See, e.g., *United States* v. *Howell*, 318 F.2d 162 (9th Cir. 1963).

The four cases cited in the report as illustrations of the "gap" are the four Court of Claims cases discussed in Statement C herein and all relate to claims for pay or personal services as distinguished from claims of supply or construction contractors. Two *(Borden* and *Keetz)* were employee discharge cases, one *(Kyer)* was a claim for brokerage commissions, and only one *(Pulaski)* involved a commercial type contract and even that was for services.

S. 980 passed the Senate without debate on June 30, 1969. 115 Cong. Rec., Part 13, p. 17697, 91st Cong., 1st Sess. The amendments added by the House were accepted without debate on July 14, 1970. 116 Cong. Rec., Part 18, p. 24186, 91st Cong., 2d Sess.

On the House side, hearings were held on S. 980 on September 24, 1969. *Hearings On S.980 Before Subcommittee No. 4 of the House Committee On The Judiciary*, 91st Cong., 1st Sess., Ser. 4 (1969), Commissioner Louis Spector of the Court of Claims appeared on behalf of the American Bar Association and advised the Subcommittee that the Association's House of Delegates and Section of Public Contract Law had endorsed the proposed legislation in principle. He stated, in part, as follows:

> [Nonappropriated fund activities] are immune from State and local taxation as an arm of the U.S. Government. They are sueable under the Federal Court of Claims Act [sic] on the ground that their torts are committed by Federal employees. In connection with their contracts overseas, they enjoy immunity from suit as an instrumentality of the United States. In this country, when they have a contract with another party, they are perfectly at liberty to sue that other party.
>
> There is just this little remnant where they are in turn immune from suit by the other party to the contract. As I say, simple equity and justice would dictate that this immunity be removed.
>
> It was over 100 years ago that President Lincoln, in sending his message to Congress to set up the U.S. Court of Claims, said: "It is as much the duty of the Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." [*Id.* at 5.]

The House Judiciary Committee also reported favorabl on S. 980. H.R. Rep. No. 91-933, 91st Cong., 2d Sess. (1970), 2 U.S. Code Cong. & Admin. News 1970. The purpose of the bill was described in the same language used in the Senate report except for the use of "loophole" in lieu of "gap" in the opening line:

> S. 980 will remove a loophole from the Tucker Act, which provides for the waiving of the sovereign immunity of the United States with respect to contract claims. Under the Tucker Act, the United States is liable in the Court of Claims of the United States and, in appropriate cases, in the district courts of the United States, to suits "upon any express or implied contract with the United States***" 28 U.S.C. 1491; 28 U.S.C. 1346(a)(2). The courts have repeatedly held, however, that the Federal Government's liability to suit under these sections only exists with respect to contract obligations to be paid out of appropriated funds. See, e.g. *Kyer* v. *United States*, 369 F.2d 714 (Ct. Claims 1966); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States*, 168 Ct. Claims 205 (1964); *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Claims 1953).
>
> The injustice and inequity worked by this Tucker Act "loophole" have been recognized often. See, e.g., *Borden* v. *United States*, 116 F. Supp. 873, 878-880 (Ct. Claims 1953). Indeed, a judge of the Court of Claims has declared "this is a matter which sorely needs congressional correction." See *Kyer* v. *United States*, 369 F.2d 714, 719 (Ct. Claims 1966). [*Id.* at 2.]

The four Court of Claims decisions cited in the above passage and in the Senate Report are the four cases which illustrated for the Committees the "loophole" or "gap" to be closed.

The House report expressed concern with the application in S. 980 to every "nonappropriated fund activity" because data concerning all such activities were not then available and "Congress ought not to expose the Federal Government to liability for *all* nonappropriated fund activities until such data is assembled." *Id.* at 3. It recommended that activities to be covered be specified as follows: Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration. *Id.* at 3. This was done, accepted by the Senate and is reflected in the legislation as passed.[25]

S. 980, as amended, passed the House on April 7, 1970. The debate brought out its purpose as being the waiver of immunity in respect to contract claims against the Exchange Services. 116 Cong. Rec., Part 8, pp. 10604-10606 (1970):

> The SPEAKER. The gentleman from Colorado (Mr. Rogers) is recognized.
>
> Mr. ROGERS of Colorado. Mr. Speaker, I urge the House to give favorable consideration to S. 980, as amended by the Committee on the Judiciary.
>
> The enactment of this measure will remove a number of inequities that have arisen as the result of a loophole in the Tucker Act.
>
> Under the Tucker Act, the United States has waived its sovereign immunity with respect to contract claims. However, the construction given to the Tucker Act by the courts has left a loophole,

[25] The House Subcommittee was concerned with the many small and oftentimes transitory "nonappropriated fund activities" such as "auto, wood, and camera hobby shops, and the like." Hearings on S.980 Before House Subcommittee No. 4, *supra*, at p. 13.

which creates inequities for some claimants. This loophole exists with respect to contracts entered into by those Federal instrumentalities which operate as nonappropriated fund activities. In short, under present construction of the Tucker Act, a plaintiff with a legitimate claim against a nonappropriated fund activity is not entitled to any judicial relief. S. 980 as reported by the Committee on the Judiciary is intended to close this loophole with respect to contracts entered into by post exchange types of operations conducted within the Department of Defense and the National Aeronautics and Space Administration. [*Id.* at 10604.]

* * * * *

Mr. ROGERS of Colorado. The reason for it is that we do not think that the exchanges which do the major portion of all this business should be immune from suit. They should at least be required to come into court and be responsible like any other function or business concern with respect to the contracts that they enter into. [*Id.* at 10605.]

* * * * *

Mr. FISH. Mr. Speaker, I rise in support of S. 980. This bill, as amended by the Judiciary Committee, should command widespread, if not unanimous support because, first, it helps correct a gross inequity in the law, second, there is no known opposition to the bill, and, third, it will not cost the taxpayers a single penny.

* * * * *

The Tucker Act, enacted in 1887, removes the protection of sovereign immunity from the United States for suits in contract. Although nonappropriated fund activities have been held to be instrumentalities of the United States and thus protected by sovereign immunity from suits in contract, the courts have held that they do not come within the ambit of the Tucker Act since the contract obligations are not paid out of appropriated funds.

S. 980, as it passed the other body, would close this loophole in the Tucker Act by permitting the aggrieved party to sue the U.S. Government where the gravamen of the complaint arises from a contract with a nonappropriated fund activity. Such activity would then have to reimburse the United States for any judgment paid. [*Id.* at 10605-06.]

The legislative history reflects Congressional concern with a "gap" or "loophole" whereby Exchange Services escaped jurisdiction. And that "gap" or "loophole" was the one made by the four cases cited: *Borden, Pulaski, Keetz* and *Kyer, supra.* Indeed, there are no others really at point in the Court of Claims, and none in other courts except the three district court cases: *Bluer, Edelstein* and *Bailey, supra.*

Correction of the "harsh result" (*Keetz,* 168 Ct. Cl. 207) imposed by *Keetz* and *Borden* was the intent. That intent to insure a day in court for employees and similar claimants illustrated by the four cases is indicated by language used in the Senate report in the following passage (relating, however, to the advisability of trying to define the meaning of "nonappropriated fund activity"):

> . . . any attempt to limit the courts in their determination of [what is a nonappropriated fund activity] would ultimately serve to create additional loopholes through which clever defendants may ultimately retreat into *the anchronism of government immunity that the bill seeks to eradicate.* [Senate Report No. 268, *supra,* at 6 (emphasis supplied)]

S. 980 became Public Law 91-350 on July 23, 1970 (84 Stat. 449).

ARGUMENT

Summary

Exchange Service employees have heretofore been considered by the courts and the government as contract employees not within coverage of most Civil Service laws, rather than "federal" employees, and this contract relationship is not precluded by certain federal elements which attach to their employment. This being so, such employees are entitled to sue the United States under the 1970 amendment to the Tucker Act relating to express or implied contracts. However, irrespective of such contract basis for suit, the Exchange Service employees are governed by executive regulations and have a Fifth Amendment interest in their employment positions, and their rights arising therefrom are enforceable under the other, non-contract provisions of the Tucker Act. Furthermore, Congress has never barred Exchange employees from suing the United States and the clear intent of the 1970 amendment was to remove any vestige of sovereign immunity of the United States in respect to obligations of the Exchange Services, whether the obligations arise from contract or otherwise. Accordingly, the denial by the Court of Claims of petitioner's motion to dismiss for lack of jurisdiction should be affirmed because jurisdiction over the claim does exist under the Tucker Act on various grounds.

I

RESPONDENT WAS AN EXCHANGE SERVICE CONTRACT EMPLOYEE ENTITLED UNDER THE 1970 TUCKER ACT AMENDMENT TO SUE IN THE COURT OF CLAIMS FOR BREACH OF EMPLOYMENT CONTRACT AND THE COURT OF CLAIMS HOLDING TO THIS EFFECT SHOULD BE UPHELD.

The Tucker Act confers jurisdiction upon the Court of Claims over "any claim against the United States founded . . . upon any express or implied contract with the United States," and the 1970 Amendment mandated that contracts with the Exchange Services are contracts with the United States. 28 U.S.C. §1491, as amended by Pub. L. 91-350, 84 Stat. 449.

The jurisdictional issue and this appeal is summarily resolved if respondent's employment relationship with the Exchange Service was contractual. Petitioner appears to concede this. Thus, after quoting the 1970 amendment, petitioner states that "the pivotal issue in the present case is whether an employee of a military exchange has an express or implied employment contract . . .," and then concludes such employees "do not have a contractual relationship with the government."[26] (Brief of the United States at 14)

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[26] The dissent below goes a bit further than the government has done yet, contending that inasmuch as legislative history of the amendment contains no explicit reference to pay cases and a reference would have been appropriate if Congress intended to extend a remedy to many thousands of employees, Congress must have intended to waive immunity only in respect to contract claims of independent third parties who contract in respect to supplies and services but not to contracts for employment services. The dissent follows, in respect to the contract question, the Fifth Circuit: *Young* v. *United States,* 498 F.2d 1211 (1974). This position is

It is fundamental that the relationship of employer and employee is a relation created by contract, either express or implied. *Fleming* v. *A. H. Belo Corp.*, 121 F.2d 207, 214 n.9 (5th Cir. 1941), *aff'd.* 316 U.S. 624 (1942), *reh. denied,* 317 U.S. 706 (1942); *Ward* v. *Atlantic Coast Line Railroad Co.,* 265 F.2d 75, 83 (5th Cir. 1959); *rev'd. on other grounds,* 362 U.S. 396 (1960); 53 *Am. Jur. 2d,* Master and Servant, §§ 14, 66 (1970).

The only exception to the principle is the special instance of public officials and these do not have enforceable contract or property rights to employment but are appointed to office. *Butler* v. *Pennsylvania,* 51 U.S. (10 How.) 402 (1850). As pointed out by the majority below, at footnote 5, the rationale for this "appointed" status is that the Government must have the power to change the agents who carry out the public duties, as well as the terms under which they work. *Id.* at 416-417. *See also Taylor* v. *Beckman,* 178 U.S. 548 (1900); *Crenshaw* v. *United States,* 134 U.S. 99 (1890); *United States* v. *Hartwell,* 73 U.S. (6 Wall.) 385 (1868); *Urbina* v. *United States,* 192 Ct. Cl. 875, 428 F.2d 1280 (1970).

The Court of Claims has long held that an Exchange Service employee is not a "federal" employee. *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964). There, as here, the plaintiff had been improperly discharged from employment by the Air Force Exchange Service in Europe. The Court stated it would have to decide that plaintiff was "an employee of the United

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rebutted by the fact the "gap" or "loophole" Congress undertook to close was formed by four cases, two of which were employee pay cases (*Borden* and *Keetz*). See Statement C above, and the Court of Claims majority response in the decision below.

States before we can correct the alleged wrong," because of lack of jurisdiction over claims against the Exchange. 168 Ct. Cl. at 207. It then concluded:

> We have repeatedly held, admittedly in other contexts, that an employee of the Exchange Service is not an employee of the United States. [168 Ct. Cl. at 207.]

The government's position in *Keetz* was that plaintiff had a *contract* of employment. (Defendant's Motion to Dismiss, filed January 30, 1964) The plaintiff, in order to avoid *Borden,* stated his claim was not "predicated" upon a contract of employment (thus not denying there was one although the government assumed otherwise) but upon the arbitrary refusal of the Exchange to comply with regulations. The government insisted to the contrary:

> Such a contention is irrelevant to the jurisdictional problems, and, moreover, *it is patently not true that the claim here is not founded on contract.* [Defendant's Opposition to Plaintiff's Motion for Leave to Join a Third Party Defendant, etc., filed April 10, 1964, at page 2] [emphasis supplied]

In *Brummitt* v. *United States,* 165 Ct. Cl. 78 (1964), at 80, by way of *dictum,* the Court stated: "On the contrary, it is established that employees of nonappropriated fund activities are *not employees of the United States.*" (emphasis in original)

In *Gradall* v. *United States,* 161 Ct. Cl. 714 (1963), at 723, the Court held plaintiff's employment in the Army and Air Force Exchange Services "did not constitute holding a civilian office or position under the United States Government" within the restrictions

of the dual compensation statute which applied to "a civilian office or position, appointive or selective, under the United States Government." 161 Ct. Cl. at 716.

The Court of Claims has now in its decision in the pending case explicity reaffirmed its position that Exchange Service employees are not "federal" employees:

> However, defendant's reliance on the "appointed" rationale begs the fundamental question of whether employees of nonappropriated fund instrumentalities are, in fact, Federal employees. If exchange employees are not Federal employees, their status is not controlled by the "appointment" rationale. And, indeed, we have stated in *Keetz, supra*, and reaffirm here, that "an employee of the Exchange Service is not an employee of the United States." *Keetz, supra*, at 207.[6] *See also Gradall, supra; Brummitt v. United States*, 165 Ct. Cl. 78, 80, 329 F.2d 966, 967 (1964).
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[6] In fact, the Government in *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964), argued that an AAFES employee had a contract of employment. We find it a bit ironic that in the instant case, the Government argues just the opposite. We can only assume that this inconsistency has occurred because the enactment of Pub.L. 91-350 now grants jurisdiction for exchange contract claims. We held the Government's contract theory in *Keetz* to be correct and see no reason to change in the instant case. [513 F.2d at 1364-65]

The Court of Claims has, in effect, in this line of cases, dichotomized employees into contractual employees of the Exchange Services and "federal" employees who are governed by the Civil Service Commission.[27] Thus, the court refers in its decision herein

[27] Congress has excluded Exchange Service employees from the Civil Service laws. Thus, 5 U.S.C. § 2105(c), in defining employee,

to the non-contract status of appointed public officers and states: "This 'appointment' status has been extended by law to include employees of the United States who are subject to the laws administered by the Civil Service Commission. *See* 5 U.S.C. §§ 2104, 2105, 3105 (1970)." (513 F.2d at 1364) In other words, the so-called appointment status employees being within the class of *Butler, Taylor, Crenshaw, et al.*, cannot have and do not have contract or property rights to employment. It follows that others outside that class are not so barred, and Congress has drawn the distinguishing lines by 5 U.S.C. § 2105.

The Court of Claims has not excluded Exchange Services employees from the status of federal in all regards, and, indeed, it could not inasmuch as Congress has included them under a number of federal employee statutes. E.g., Act of Aug. 19, 1972, § 1(a), 86 Stat. 564, 5 U.S.C. § 5342(a)(1) (1975 pocket part), equality of pay among government employees applies to Exchange employees except those in recognized crafts or trades.

The issue is not whether an Exchange Service employee is a federal employee but whether his employment status is contractual. The contractual and federal concepts are overlapping rather than mutually exclusive.[28] Those who are not in the *Butler, et al.*

provides an Exchange Service employee is not an employee for purpose of laws administered by the Civil Service Commission, with some exceptions. See Brief of United States at 1A for statute. See further discussion of statute in Argument II herein.

[28] The Court of Claims failed to develop this distinction as the Exchange Services were growing from mere instrumentalities to major instruments of government operations. Assuming validity to the pre-1970 lack of jurisdiction over Exchange contracts, the employees should have been granted their claims on the basis the

class are, necessarily, contractual, because it is only that class which lacks enforceable contract or property rights in employment.

The government's frequent view,[29] conflicting with its present position, in the Court of Claims over the years that Exchange Service employees do not have status as federal employees (but have a contractual relationship) was sometimes echoed in the other major line of cases related to the Exchange Services, those interpreting the Federal Tort Claims Act. (See Summary C (iii), above.) E.g., it contended unsuccessfully such an employee was not an "employee of the Government" under that act. *Daniels* v. *Chanute Air Force Base Exchange*, 127 F.Supp. 920 (E.D. Ill. 1955). In a subsequent case, it stipulated that the plaintiff employee "was not a Government employee. . ." *Aubrey* v. *United States*, 254 2d 768, 770 (D.C. Cir. 1958).

The Civil Service Commission has in the past considered Exchange employees to be contract employees. Subsequent to *Standard Oil Co. of California* v. *Johnson, supra*, there arose confusion whether employees

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claims arose under the other, non-contract elements of the Tucker Act. The Fifth Circuit, on which petitioner relies, essentially takes this position. *Young* v. *United States*, 498 F.2d 1211 (1974). See discussion below in Argument II.

[29] It is not contended that the government's prior position was necessarily a deliberate and consistent policy as, no doubt, it was in large part dictated by situational advocacy. E.g., obtaining interpretation of the Federal Tort Claims Act, defending against contrasting claimants' positions in *Borden* and *Keetz*. On the other hand, legislative history does not disclose that the Department of Justice advised Congress in the processing of S.980 that there existed a remaining "gap" or "loophole" in the Tucker Act through which the government would "ultimately retreat into the anachronism of government immunity that the bill seeks to eradicate." Senate Report No. 268, *supra*, at 6.

of Exchanges as "arms" of the government were subject to the requirements and entitled to the benefits of Civil Service. Legislation was proposed (enacted and now 5 U.S.C. § 2105(c)) and the Chairman of the Commission submitted its position to Congress by letter dated July 23, 1951, addressed to the Hon. Tom Murray:

> Based upon early decisions of the Court of Claims, and decisions of the accounting officers of the Government, the Commission determined that employees of post exchanges were not Government employees in the executive service but were employees of the exchanges *working under what amounted to a private contract of employment.* This ruling was followed prior to a decision of the Supreme Court of the United States concerning the status of Army post exchanges (*Standard Oil Company* v. *Johnson*, 316 U.S. 481, decided June 1, 1942). [H.R. No. 1995, 82d Cong., 2d Sess., 2 U.S. Code Cong. & Adm. News 1952, at 1523.] [emphasis supplied]

The 5 U.S.C. § 2105(c) exclusion of Exchange employees from Civil Service Commission laws was consistent with prior treatment by the Commission as being under "contract of employment" and was enacted to avoid change in their status after *Standard Oil Co. of California* v. *Johnson, supra.*

Petitioner's attempt here to categorize Exchange employees as federal and, therefore, not contractual relies on the Army and Air Force regulations (AR 60-21/AFR 147-15) [30] (See Appendix B of Brief of United

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[30] Judge Whitaker answered the contention that Exchange Service regulations can control the question of jurisdiction, in his dissent in *Borden* v. *United States, supra.* He referred to the then (1945) AR provision that exchange contracts are not government contracts and stated:

States.) Thus, petitioner refers to the regulation language, "authority to appoint," and to the explicit provisions for employment agreements for special functions and specific periods of time (perhaps, e.g., a consultant). It is obvious from the executive regulations applicable to Exchange Services that the military departments have substantially superimposed on the Exchanges the structure and procedures applicable to all federal employees, a practical management arrangement. But this arrangement and the use of the word "appoint" does not preclude contract status for employees. Petitioner cites no authority to the contrary.[31] The words "employ", "employees" and "employment" are also used consistently in the regulations.[32] These and comparable words are used interchangeably both in business and in government in reference to

> By what authority does the Army say that their contracts are not government contracts? Congress has not authorized it to do so. It authorized it to set up exchanges, but Congress did not authorize it to set aside a prior Act of Congress making the Government liable to suit on its contracts, express or implied. The quoted Army regulation is in derogation of the Act of Congress giving consent to suit on its contracts. It is, therefore, invalid. The Army cannot set aside an Act of Congress. [126 Ct. Cl. at 912]

[31] Unquestionably the Exchanges have general authority to contract and have always done so. Further, there are no statutes preventing the Exchanges from documenting all civilian employment by means of an elaborate form of "Contract of Employment" rather than "Personnel Action" notice or comparable form. It is noteworthy the Government did not contend the written contract in *Borden* was void or that the implied contract it contended existed in *Keetz* was void.

[32] The A/AF regulations provide for several employee pay plans including a commission plan whereby pay is "computed on the basis of an established percentage of sales volume," which is certainly more the flavor of contract than appointment. (See section 4-19b(3), at 8A, Brief of United States.)

wage earners, salaried persons and executives. The use of "appoint" can be form only and does not establish a legal relationship contrary to statute or that implied by law. *Burnap* v. *United States,* 252 U.S. 512, 64 L.Ed. 692 (1920) [33] In reality, the regulations upon which petitioner relies constitute the contract terms of employment between the Exchanges and their civilian employees.

Petitioner also contends that decisions holding Exchange employees are federal employees under the Federal Tort Claims Act establish they are non-contractual because other federal employees covered thereunder are non-contractual. (Brief of United States, at 22) The purpose of the Tort Claims Act was to waive tort immunity of the United States "under circumstances where the United States, if a private person, would be liable. . ." (28 U.S.C. §1346(b)) And such liability was extended to torts "of any employee of the Government" within the scope of his employment. (*Ibid.*) The statute did not seek to differentiate classes of federal employees and there is nothing in the Act which limits liability to acts of non-contractual employees. Rather, the word "employee", as used in the Act, "is to be read as having the same general meaning as the term 'servant' has in the body of law relating to the doctrine of respondent superior." *United States* v. *Becker,* 378 F.2d 319, 321 (9th Cir. 1967). Liability under respondent superior is determined not by a tech-

[33] Indeed, the record does not show the documentation reflecting the form of respondent's engagement. Respondent alleged below that his "employment arose by virtue of a contract of employment . . . and/or by virtue of appointment pursuant to regulations . . ." (Petition below, ¶4) To the extent that factual matters are involved, there is no evidence of record and no resolution of facts at the present stage of the litigation.

nical employment category but by such elements as power of control. 53 *Am. Jur.* 2d, Master and Servant, § 2.

Describing the employment relationship here as federal or non-federal is immaterial. The issue is whether the relationship was contractual. The theory that *every* federal employment status is incompatible to contract is untenable. There are no constitutional or statutory barriers whatever proscribing a contractual relationship for Exchange Services employees. The non-contract concept in respect to federal employment means only that ordinarily no enforceable contract or property rights vest in the employee. *Taylor* v. *Beckham,* 178 U.S. 548 (1900); *Crenshaw* v. *United States,* 134 U.S. 99 (1890). But, Congress can, of course, instruct the heads of departments as to conditions for the appointment of "inferior Officers" (U.S. Const. Art. II, § 2) as it deems best. *United States* v. *Perkins,* 116 U.S. 483, 29 L.Ed. 700 (1886). Congress could convert the so-called "appointed" relationship of all inferior federal officers to a full contractual relationship, and, indeed, has substantially done so and more by virtue of the numerous statutes governing federal employment.

Congress has recognized the contract status of Exchange Service employees as set forth in judicial decisions over the years. Thus, by its monitoring of Exchange Services, the frequent appropriations for them, and the approval of military regulations governing the Exchanges, it has approved the status. (Statement B, above.) And by excluding Exchange employees from the Civil Service Commission administered laws (after the *Standard Oil* case in 1942) and now by enacting the 1970 Tucker Act amendment to close the "gap" or

"loophole" caused by *Borden* and *Keetz,* it confirmed the contractual relationship of Exchange employees.

II

PETITIONER'S CONTENTIONS THAT EXCHANGE EMPLOYEES HAVE NO CONTRACT OR OTHER EMPLOYMENT RIGHTS ARE ANACHRONISTIC AND CONTRARY TO THE INTENT OF CONGRESS AND PRIOR PRECEPTS OF THIS COURT

Petitioner opens its argument (Summary at p. 5) by stating the issue is whether "the United States has waived sovereign immunity to suit by a former employee of the United States Exchange Service." Actually, sovereign immunity is not really involved as Congress has long since waived by the Tucker Act all immunity in respect to claims *against the United States* founded upon the Constitution, any act of Congress, any executive regulation, any express or implied contract, or for liquidated or unliquidated damages not sounding in tort. Respondent's claim here for improper employment discharge necessarily must relate to either Constitutional or statutory or regulatory and/or contract rights, and to non-tort damages. The question is not waiver but whether the claim for invasion of respondent's rights is one against the United States, i.e., one for which the United States is responsible and liable, whether it arises from contract or otherwise.

Petitioner pursues its sovereign immunity argument with five contentions: (a) the Tucker Act is procedural and the source for money damages must be founded elsewhere; (b) Congress has denied Exchange employees all right to sue by excluding them from the Lloyd-LaFollette Act and Back Pay Act; (c) there is no statute, regulation, or other substantive basis for enforcing claims of the employees against the United

States; (d) the lack of explicit reference in the legislative history of the 1970 amendment to employee pay claims establishes Congress did not intend to grant such right; and (e) the pre-1970 prohibition of employee suits must remain in effect. These have been partially answered above and now will be answered further *seriatim*.

Each of the contentions violates injunctions by this court respecting interpretation of the Tucker Act:

> It is "an inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye." *United States* v. *Emery, Bird, Thayer R. Co.*, 237 U.S. 28, 32, 59 L.Ed. 825, 827 (1915) (Holmes, J.)
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> Congressional actions removing government immunity "should be given hospital scope." *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381, 391, 83 L.Ed. 784, 790 (1939) (Frankfurter, J.)

Further, if successful, petitioner's contentions would achieve what Congress sought to prevent by the 1970 Tucker Act Amendment:

> . . . additional loopholes through which clever defendants may ultimately retreat into the anachronism of government immunity that the bill seeks to eradicate. [Senate Report No. 268, *supra*, at 6.]

(a) Tucker Act provides substantive right to suit

In respect to petitioner's contention that the Tucker Act alone provides no independent, substantive right to sue, it has been held this "wrongly equates the issue of jurisdiction with the merits." *Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 124 (1965), *cert. den.*

381 U.S. 950, 14 L.Ed. 2d 723 (1965). A person claiming money damages on the grounds "a statute or regulation grants him that right, in terms or by implication, can properly come to the Court of Claims" and "the court will assume jurisdiction and decide his case on the merits. . ." *Id.* at 125-126.

It is not required that "there be any specific consent-to-suit apart from the Tucker Act." *South Puerto Rico Sugar Co. Trad. Corp.* v. *United States*, 167 Ct. Cl. 236, 244 (1964). "The authority for a suit is found in the general terms of the Tucker Act and need not be reiterated in every enactment of Congress upon which a claim against the United States could be 'founded.' " *Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518, 521 (5th Cir. 1948).

This has been explained as follows:

> To limit the recovery in cases "founded" upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. "Founded" must therefore mean reasonably involving the application of a law of Congress. [*Compagnie General Transatlantique* v. *United States*, 21 F.2d 465, 466 (2d Cir. 1927) (A. Hand, J.), citing *Dooley* v. *United States*, 182 U.S. 222, 45 L.Ed. 1074 (1901) as in accord.]

(b) Civil Service statutes are not affirmative bars to suit

Neither the Lloyd-LaFollette Act nor the Back Pay Act nor other statute affirmatively denies Exchange Service employees all jurisdictional rights, contrary to petitioner's contentions. The former, as enacted in 1912, provided for control of the removal and suspen-

sion of individuals in the "competitive service", and did not address itself to nonappropriated fund activities at all. (Act of August 24, 1912, ch. 389, § 6. 37 Stat. 555, now 5 U.S.C. § 7501, formerly 5 U.S.C. § 652).

After this Court's 1942 decision in *Standard Oil Co. of California* v. *Johnson, supra,* the question arose whether Exchange employees should be included within the "competitive service" inasmuch as the Exchanges were instrumentalities of the United States. Clarification was needed and the present 5 U.S.C. § 2105(c) (formerly 5 U.S.C. § 150k) resulted. (Act of June 19, 1952, ch. 444, § 1, 66 Stat. 138.) The legislative history is pertinent. 2 U.S. Code Congr. and Admin. News, 1952, at 1520-28. House Report No. 1995 stated the purpose of the bill (S.1828) was to clarify status of nonappropriated fund employees who had not been considered covered by the Civil Service laws until *Standard Oil Co. of California* had precipitated questions.

The Report contained a Department of Defense opinion on the proposed bill, by letter dated June 25, 1951, wherein that Department recommended the proposal to exclude Exchange employees from Civil Service rules and regulations be enacted. The reason given was that including employees under Civil Service rules and regulations would be a hardship because post exchange employees are often transitory.[34]

[34] Many wives of servicemen work for post exchanges and they may, of course, be transitory depending on their husband's assignments and tours. Congress has recently expressed great interest, in respect to overseas installations, that there be "employment opportunities for military dependents" in commissaries. *H.A.S.C.* No. 92-75, at 16635. Many employees "are, of necessity, temporary and part-time." *Id.* at 16615.

The Civil Service Commission opinion, by letter dated July 23, 1951, commented that prior to *Standard Oil Co. of California* v. *Johnson, supra.,* the Exchange employees were considered employees of the Exchanges "working under what amounted to a private contract of employment." [35]

The Committee report advised Congress that the bill would not take away existing rights of Exchange employees nor confer new ones. The bill passed, becoming 5 U.S.C. § 150k and now 5 U.S.C. § 2105(c), and made laws carried out by the Civil Service Commission inapplicable to Exchange employees.

The Back Pay Act, which petitioner also refers to, provides that the Civil Service Commission shall administer that act. Pub. L. 90-83, § 1(34)(c), Sept. 11, 1867, 81 Stat. 201 (5 U.S.C. § 5596). Therefore, it also, in view of 5 U.S.C. § 2105(c), is not applicable to Exchange employees. But again, there is no specific refference in the act to such employees.

These statutes, and others administered under the Civil Service Commission areas of responsibility, do not apply to Exchange employees, but this does not mean that Congress intended such employees to have no contract rights nor other rights arising from the various jurisdictional bases set forth in the Tucker Act.[36] The Fifth Circuit rejected the identical conten-

[35] The C.S.C. letter complained that the bill was not clear enough in that it did not say whether Exchange employees were federal employees for other purposes such as crediting Exchange employment for retirement and retention purposes if the employee subsequently becomes a Civil Service employee. Congress appears to have ignored this invitation to further clarification.

[36] In some sections of U.S.C. Title 5 (Government Organization and Employees), Congress has specifically applied provisions to

tion by the government, as discussed below. *Young* v. *United States,* 498 F.2d 1211 (1974).

(c) Regulations and due process as basis for suit

Petitioner's contention that there is no statute or regulation or other substantive right of Exchange employees to be enforced against the United States is refuted in recent decisions by this court. In *Young* v. *United States, supra,* the Fifth Circuit applied those decisions to facts substantially identical ot the present. The *Young* plaintiff was an employee of the Army and Air Force Exchange Service, subject to the same regulations, AR 60-21/AFR 147-15, as respondent. 498 F.2d at 1219-20. See Appendix A herein of Brief of United States at 3A-17A for the regulations and in particular Section 3-8 (at 6A) relating to separation for cause. The Fifth Circuit held "these safeguards and standards establish protections against arbitrary dismissal." *Id.* at 1220. They constitute "attributes of 'property' interests protected by procedural due process" as described in *Board of Regents* v. *Roth,* 408 U.S. 564, 33 L.Ed. 2d 548 (1972). The claimant's interest in continued employment "is well within the parameters defining property interests protected by the Fifth and

nonappropriated fund activities, e.g., § 5531 (dual compensation), § 7902 (safety programs), § 8501 (unemployment compensation). The Executive branch groups Exchange employees with other federal employees for some purposes. For example, section 2(b) of Executive Order 11491, dated October 29, 1969, establishing a program of Labor Management Relations in the federal service, declares that the "employees" covered by its provisions include employees of both agencies and nonappropriated-fund instrumentalities. 34 F.R. 17605, 3 C.F.R. (1966-1970 Comp.) 861, 862. According to its preamble, the purpose of the order was to establish "effective labor-management relations *within the Federal service.*" *Id.* at 862. (emphasis supplied)

Fourteenth Amendments in such recent cases as *Goldberg* v. *Kelly,* 1970, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (termination of welfare benefits); *Morrissey* v. *Brewer,* 1972, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed 2d 484 (parole revocation); *Bell* v. *Burson,* 1971, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (revocation of driver's license); *Sniadach* v. *Family Finance Corp.,* 1969, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (garnishment of wages)." *Id.* at 1220-21.

The Fifth Circuit noted that the regulations defining employment relationship of the Exchange employee, unlike the Civil Service employee in *Arnett* v. *Kennedy,* 416 U.S. 134, 40 L.Ed. 2d 15 (1974),

> . . . is not governed by terms and conditions of an employment which flow from a discrete federal statutory provision. But interests protected by the Fifth Amendment need not be, and in fact often are not, grounded in federal statutory law. [*Id.* at 1219.]

The inapplicability of the Lloyd-LaFollette Act to Exchange employees does not alter this and, indeed, "the plaintiff here has more of a claim of entitlement than the plaintiff in *Arnett,* because the Army and Air Force regulations . . . provide standards for effecting separations which are more vigorous and more fully articulated than those contained in the Lloyd-LaFollette Act." *Id.* at 1221.

Further, because "the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law." *Standard Oil Co. of California* v. *Johnson,* 316 U.S. at 484. Those regula-

tions were promulgated "under authority of Congressional enactments." 316 U.S. at 483-484.

The Fifth Circuit held that the relationship established under the regulations, AR 60-21/AFR 147-15, "is subject to the protection of the Due Process Clause of the Fifth Amendment." *Young* v. *United States,* 498 F.2d at 1221.

Furthermore, it is immaterial whether the Army and Air Force regulations ensued from a discrete federal statutory provision. There must be conformance with procedural safeguards set down by regulations, even though such safeguards are gratuitous. *Vitarelli* v. *Seaton,* 359 U.S. 535, 539, 3 L.Ed. 2d 1012, 1016 (1959). Specified discharge procedures beyond the necessities of statute must be scrupulously observed. *Service* v. *Dulles,* 354 U.S. 363, 1 L.Ed. 2d 1403 (1957).

It has long been established that an employee is entitled to the pay of his office if discharged in violation of statutory or other authority. *United States* v. *Perkins,* 116 U.S. 483, 29 L.Ed. 700 (1886).[37]

(d) Lack of explicit reference in legislative history is not significant

Petitioner contends the lack of explicit reference in the legislative history of Pub.L. 91-350 to Exchange employees establishes Congress did not intend to grant such employees a right to sue the United States.

[37] That case laid down the rule that when Congress "vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest . . . .", The heads of the departments must be so governed, and if the limitations are violated, the claimant "is entitled to the pay attached to [his position]." 116 U.S. at 483. *Perkins* is still the foundation in pay cases. *E.g., Borak* v. *United States,* 110 Ct. Cl. 236 (1948).

The legislative history makes quite clear that Congress was concerned with a "gap" or "loophole" whereby the United States escaped responsibility for its Exchange Services and that "gap" or "loophole" was framed by the four cases relied on by Congress: *Borden, Pulaski, Keetz,* and *Kyer.* Correction of the "harsh result" in *Keetz* (168 Ct. Cl. at 207, European Exchange Service employee claim identical to respondent's) was the intent and purpose of Congress. (See Statement C, above.)

There was no need for Congress to make explicit reference to employee claims.[38] It was aware that Exchange employees had been barred from suit. It was told by all witnesses the proposed bill would close the last "gap" or "loophole" of immunity. It was told by the Chief Judge of the Court of Claims that the judges of the Court of Claims "have no suggestions for any changes or amendments." (Statement D, above.)

Congress was not informed by the Department of Justice or other executive departments that there existed another, unmentioned "gap" or "loophole" through which the Government, when this respondent

[38] Petitioner refers to the "vast number" of Exchange employees in excess of 100,000 (Brief of United States, at 7) for the point that Congress would have been explicit if intending to benefit them. But neither is the number of business contractors providing billions of dollars of materials and services expanded on in the legislative history. That large numbers of businesses and employees were involved was obvious from the nature of the Exchange operations. For reasons stated in the text, Congress grouped all together as contractors. There is nothing in the legislative history indicating Congress was concerned in particular with the vast number of businessmen contracting with the Exchange Services to the exclusion of individuals who run the Exchanges and lack the self-protecting position businessmen possess.

filed suit, would "ultimately retreat into the anochronism of government immunity." (Statement D, above.) Surely, petitioner does not seek to wring the old concept one more time so that "all of this old straw would have to be threshed [again] to find the kernel of relief." *Guggenheim* v. *United States,* 127 Ct. Cl. 121, 126 (1953).

(c) Pre-1970 non-jurisdiction holdings no longer valid

Petitioner contends that the pre-1970 treatment of Exchange Service employees as jurisdictional pariahs should remain in effect, although no justification of policy or governmental need is offered. The pre-1970 decisions of the Court of Claims on which petitioner is balancing hinged on this court's observation that the "government assumes none of the financial obligations of the exchange." 316 U.S. at 485. Quite clearly, that apparently misconstrued comment is no longer valid. Crimes against the Exchange Services are crimes against the United States and prosecuted by it. The United States is liable for all torts of the Exchanges. It is liable for all contract claims (subject to reimbursement) of the Exchanges. Exchange employees are excluded, for practical reasons, from Civil Service Commission administered laws but are subject to many other statutes governing federal employees. Exchange Services *per se* enjoy immunity domestically and abroad. (See Statement C, above.)

Any support for the non-jurisdiction holdings of *Borden, Pulaski, Keetz,* and *Kyer,* of doubtful validity in any event, has been nullified by later developments and, therefore, the United States is liable for and amenable to suit under the Tucker Act for claims arising from its gargantuan instrumentality. Congress

made this abundantly clear. It closed the last "gap" or "loophole" of immunity then remaining in the Court of Claims, and undertook to bar any "additional loophole". (Statement D, above.)

III

RESPONDENT'S CLAIM, IRRESPECTIVE OF ITS CONTRACT BASIS, IS FOUNDED UPON THE CONSTITUTION, ACTS OF CONGRESS, AND REGULATIONS, AND IS FOR NON-TORT DAMAGES.

Respondent's claim is within the jurisdiction of the Court of Claims because (a) the United States is now fully liable for obligations of the Exchange Services, (b) respondent's discharge in violation of executive regulation constitutes a claim enforceable under the Tucker Act, and (c) his discharge without due process constitutes a claim founded on the Constitution as well as subject to judicial review under the Administrative Procedure Act and, therefore, enforceable under the Tucker Act.

(a) United States is now fully liable for Exchange Service activities.

The Exchange Services are no longer instrumentalities which petitioner can abjure in the Court of Claims on the grounds the United States has assumed "none of the financial obligations" thereof. As noted heretofore, Congress monitors Exchange operations and periodically appropriates funds for them; executive regulations govern the Exchanges and government officials control them with resulting operating profits put to government-directed use;[39] the United States prose-

[39] A House Subcommittee found in 1972 that there was "excessive pressure" on the Exchanges to increase profit margins with the objective of generating more funds for welfare and recreational purposes. H.A.S.C. No. 92-75, at 16613.

cutes financial and other crimes against the Exchanges; the United States is liable for all torts committed by employees of the Exchanges; and the United States is liable on all contracts of the Exchanges. The Exchanges have the usual accouterments of governmental entities including the franking privilege [40] and absence of taxability, both state (by immunity) and federal (because an instrumentality).

Obviously, the United States has now fully assumed both the obligations and benefits of the Exchange Services. Congress never affirmatively conferred immunity on the United States in respect to Exchange operations, and by the 1970 amendment it closed the "gap" or "loophole" of immunity caused by the Court of Claims concept of non-responsibility for "nonappropriated fund" activities.[41] The underpinnings of non-jurisdiction in *Borden, et al.*, are gone and that concept is no longer tenable in respect to the Exchange Services. The United States is, therefore, accountable for Exchange operations to the same extent as it would be under the Tucker Act for activities of other executive agencies.

(b) Respondent's claim for discharge in violation of executive regulations is an enforceable claim against the United States under the Tucker Act.

Respondent's cause of action states his discharge from the Exchange Service was procedurally defective

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[40] Exchanges have had the franking privilege for many years. January 23, 1902, Circular No. 5, Hdqrs. of the Army.

[41] "A statute cannot be divorced from the circumstances existing at the time it was passed or from the evil which Congress sought to prevent or correct." *Benton* v. *United States*, 203 Ct. Cl. 263, 270 (1973).

because, *inter alia*, it was effected by an unauthorized military officer, without adequate notice and otherwise in violation of governing regulations, the appeal and review procedure was defective, the discharge was arbitrary and capricious and without substantial support, and was in violation of due process and a breach of respondent's contract of employment. (Petition of plaintiff in Court of Claims) It must be assumed for the purpose of this appeal that the aforesaid allegations are correct.

It has long been established that a federal employee is entitled to the pay of his office if discharged in violation of statutory or other authority. *United States* v. *Perkins*, 116 U.S. 483, 29 L.Ed. 700 (1886). Although, in the absence of restrictions, the executive has full discretion in respect to employees (*Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 417, 13 L.Ed. 472, 478 (1850)), this is not so where limitations are prescribed, in which event the executive must be so governed. *United States* v. *Perkins, supra;* see footnote 37, above.

There existed elaborate procedures for discharge actions which were applicable to respondent's position and these were in the form of authorized executive regulations which had the full force and effect of law. *Standard Oil Co. of California* v. *Johnson, supra; Vitarelli* v. *Seaton, supra; Service* v. *Dulles, supra; Young* v. *United States, supra.* See Argument II, (c), above.

The Court of Claims has jurisdiction under the Tucker Act over discharge claims of federal employees who lack Lloyd-LaFollette Act or Veterans Preference Act or other Civil Service protection from dismissal and allege procedural error or arbitarariness in the dismissal action. *Batchelor* v. *United States*, 169 C. Cl.

180 (1965) (claim of a Schedule A or excepted employee heard and then dismissed on the grounds there was no showing of procedural error or arbitrariness).

Therefore, respondent's claim is one against the United States founded upon regulations of the executive department and for non-tort damages and is within the jurisdiction of the Court of Claims.

(c) Respondent's claim is also founded on Fifth Amendment and Administrative Procedure Act and is, therefore, within the jurisdiction of the Court of Claims.

Respondent was entitled to procedural due process. U.S. Const. amend. V. An employee of the Exchange Service has property interests in being continued in his position sufficient to require procedural due process prior to his discharge. *Young* v. *United States, supra*. See Argument II (c) above. The Administrative Procedure Act relating to judicial review (5 U.S.C. §§ 701-706) entitles respondent to a review of the discharge procedures effecting his dismissal. *Id.* at 1221; *Charlton* v. *United States,* 412 F.2d 390 (3rd Cir. 1969); *Polcover* v. *Secretary of Treasury,* 477 F.2d 1223 (D.C. Cir. 1973).

The Tucker Act authorizes the Court of Claims to adjudicate claims against the United States founded upon the Constitution and any Act of Congress, or for liquidated damages not sounding in tort. Respondent claims his discharge was in violation of procedural due process, was arbitrary and capricious, and lacked substantial support in fact. Therefore, his claim is founded upon the Fifth Amendment and for this further reason is within the jurisdiction of the Court of Claims.

CONCLUSION

Respondent was one of over 100,000 Exchange Service employees who, unlike any other employees in the United States, have heretofore been denied all judicial recourse for violation of employment rights. This intolerable condition has been corrected by the Court of Claims whose judgment below should be affirmed.

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